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No. 91-1817

In the Supreme Court of the United States

OCTOBER TERM, 1992

EDMUND M. HURLEY AND CHARLES R. BURNETT,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the decision in this case conflicts with *United States* v. *Minarik*, 875 F.2d 1186 (6th Cir. 1989).

2. Whether the decision in this case conflicts with *United States* v. *Pritchett*, 908 F.2d 816 (11th Cir. 1990).

3. Whether the "defraud" clause of 18 U.S.C. 371 is unconstitutionally vague.

4. Whether the prosecution's use of the term "money laundering" during opening statement and closing argument constituted an unconstitutional constructive amendment of the indictment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A35) is reported at 957 F.2d 1.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1992. A petition for rehearing was denied on March 11, 1992. Pet. App. A36. The petition for a writ of certiorari was filed on May 8, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners and five co-defendants were charged in a 15-count indictment with conspiracy to defraud the United States by impeding, impairing, obstructing, and defeating the lawful functions of the Internal Revenue Service in the ascertainment, computation, and collection of income taxes owed by Salvatore M. Caruana, in violation of 18 U.S.C. 371 (Count 1); conspiracy to engage in racketeering, in violation of 18 U.S.C. 1962(d) (Count 2); racketeering, in violation of 18 U.S.C. 1962(c) (Count 3); and use of foreign facilities in aid of racketeering, in violation of the Travel Act, 18 U.S.C. 1952(a)(1) (Counts 4-15). Gov't C.A. Br. 1; Pet. App. A2. At the close of the government's case, the district court granted petitioners' motions for a judgment of acquittal on all counts except the conspiracy to defraud count as it related to both petitioners, the racketeering conspiracy count as it related to petitioner Hurley, and one Travel Act count against petitioner Burnett (Count 14). Pet. App. A7; Gov't C.A. Br. 1. On April 19, 1990, the jury returned a guilty verdict against petitioners on Count 1 and acquitted them on the remaining counts. Pet. App. A2, A7.

On July 9, 1990, petitioner Hurley was sentenced to serve 8 months in prison and 16 months on probation, and petitioner Burnett was sentenced to serve 6 months in prison and 12 months on probation. In addition, each petitioner was fined $10,000. Gov't C.A. Br. 2.

2. Both petitioners are lawyers who spent a considerable amount of time working for co-defendant Salvatore "Mike" Caruana, a drug smuggler who earned millions of dollars from the unlawful importation and distribution of marijuana and hashish

between 1978 and 1981. Pet. App. A3-A4. Caruana has been a fugitive since March 1984. Pet. App. A4.

Petitioners helped Caruana hide $5 million of his illegal earnings through a network of Panamanian and Bahamian companies, which made loans and investments in unusual ways, including the transfer of large amounts of cash. Pet. App. A5. For example, on two separate occasions involving Hurley, Caruana transferred $100,000 in currency from briefcases to borrowers. *Ibid.* After Caruana fled, Burnett helped arrange for checks drawn on Panamanian accounts to be made out to the names of third parties, although the checks were actually for Caruana's use. *Ibid.* The cash transactions created the appearance that Caruana had legitimate income, and the third-party checks enabled Caruana to receive funds in a manner that concealed that he was the recipient. Pet. App. A6.

Petitioner Hurley provided legal services to Caruana from the late 1970s through at least the fall of 1982. Those services included participating in the two $100,000 cash transactions and investing the narcotics proceeds in a purportedly legitimate precious metals firm in Massachusetts. Pet. App. A21-A24. After 1982, Hurley continued his involvement with Caruana by receiving checks for investment earnings that Hurley then forwarded to the Bahamas. Moreover, Caruana and Hurley had more than a formal business relationship. During the conspiracy, when Caruana was actively engaged in drug dealing and had no other apparent source of income, Hurley lived for several months in a house on Caruana's compound in Massachusetts. Pet. App. A25; Gov't C.A. Br. 4.

Arnold Katz, one of Caruana's drug distributors, testified that, on Caruana's recommendation, he met with Hurley in early 1980 and told him that he was

looking for ways to "legitimize" money he had earned "doing the deals" with Caruana. Later that year, in Caruana's home, Hurley complied with Caruana's request to explain to Katz the "technical" aspects of setting up offshore companies "to filter money into them." Pet. App. A20. After that discussion, Caruana gave Hurley a paper bag containing $25,000 in cash to pay the expenses of setting up a corporation for Katz; Caruana told Hurley that the money came from another drug dealer's "load." Pet. App. A21.

Petitioner Burnett worked for Caruana from 1982 until 1986. In 1984, Burnett visited Caruana in Boston, just two weeks before Caruana was scheduled to go to trial on marijuana importation charges. Pet. App. A26. After Caruana became a fugitive, Burnett used a computer and code name to maintain secret communications with him and continued to transact business for him. Pet. App. A6. During that time, Burnett arranged for the issuance of cashier's checks for Caruana's use, stored Caruana's money laundering records, and participated in a complex transaction to channel certain insurance proceeds through several third parties to Caruana. Pet. App. A29-A31. Although Burnett did not become involved with Caruana until after Caruana's drug ventures had ended, the transactions and contacts between Burnett and Caruana provided circumstantial evidence that Burnett was aware of the source of Caruana's wealth. See Pet. App. A28.

3. On appeal petitioners argued (1) that the indictment was defective because it charged a conspiracy to defraud the United States rather than a conspiracy to commit a specific tax offense, and (2) that the evidence was insufficient to prove that they entered an agreement to deceive the IRS.

In support of their first argument, petitioners relied primarily on *United States* v. *Minarik*, 875 F.2d 1186 (6th Cir. 1989). In *Minarik*, the court held that the government must prosecute under the "specific offense" clause, rather than under the "defraud" clause, of 18 U.S.C. 371 where the object of the conspiracy is described by a specific criminal statute that closely defines a citizen's duties. 875 F.2d at 1194-1196.[1] Petitioners argued that they had no general responsibility to assist the IRS in its effort to collect taxes and that their prosecution and conviction under the non-specific defraud clause therefore violated their due process rights. Pet. App. A10-A11.

The court of appeals rejected that argument. First, it observed that the Sixth Circuit has narrowly limited *Minarik* to the facts of that case and that other courts have declined to read *Minarik* expansively. Pet. App. A11, citing *United States* v. *Sturman*, 951 F.2d 1466, 1472-1474 (6th Cir. 1991), cert. denied, Nos. 91-1367, 91-1533, & 91-1596 (June 15, 1992); *United States* v. *Mohney*, 949 F.2d 899 (6th Cir. 1991); *United States* v. *Bilzerian*, 926 F.2d 1285, 1301 (2d Cir.), cert. denied, 112 S. Ct. 63 (1991); *United States* v. *Reynolds*,

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[1] 18 U.S.C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

919 F.2d 435, 439 (7th Cir. 1990), cert. denied, 111 S. Ct. 1402 (1991). Adopting the reasoning of those decisions, the court concluded that the problem in *Minarik* was not that the defendant had been charged under the "defraud" clause but that the government had repeatedly shifted its theory of prosecution. Pet. App. A11-A12. The court found that there was no similar problem in this case because the government consistently had maintained that petitioners sought to deceive the IRS through the money laundering activities in which they participated. Pet. App. A12.

Second, the court of appeals determined that the facts in *Minarik* were distinguishable "in a critical respect." Pet. App. A12. In this case, the government charged and proved that petitioners participated in a complex and longstanding scheme to deceive the IRS regarding the amount and source of Caruana's income and assets; in *Minarik*, the conspiracy arose from a single event (the sale of a house) and had a narrow object—the concealment of assets upon which the IRS was empowered to levy. Pet. App. A12-A13. Quoting the Sixth Circuit's decision in *United States* v. *Sturman*, 951 F. 2d at 1473, the court of appeals characterized petitioners' conspiracy as "one to prevent the IRS from ever being able to enforce the [Internal Revenue] Code against the defendants" rather than a conspiracy to violate specific provisions of the Code. Pet. App. A13.

The court also rejected petitioners' contention that money laundering was legal at the time they acted, that they therefore had no duty to refrain from such conduct, and that they could not be prosecuted for that conduct under the defraud clause of Section 371. Pet. App. A13-A14. Noting that Section 371 does not require that the means used to achieve the unlawful goal of a conspiracy be unlawful, the court reiterated

its prior holdings in *United States* v. *Cambara*, 902 F.2d 144, 146-147 (1st Cir. 1990), and *United States* v. *Tarvers*, 833 F.2d 1068, 1075 (1st Cir. 1987), that evidence of a defendant's knowing participation in laundering drug-derived profits will support a jury finding of conspiracy to impede the IRS in its collection of taxes. Pet. App. A14.

The court also found unpersuasive petitioners' contention they did not have fair warning that their "legal" conduct could be the basis for a criminal prosecution. The court found that the statutory prohibition against defrauding the government gave petitioners adequate notice that a scheme to frustrate tax collection was unlawful. Pet. App. A15.

Finally, the court considered petitioners' argument that there was insufficient evidence to support the verdict. Pet. App. A16-A35. Petitioners argued that the evidence did not show an "unlawful objective." They claimed that the record demonstrated only that they performed legitimate legal services for a client who had substantial resources. Pet. App. A16. The court rejected petitioners' contention. It observed that the government need not show direct evidence of tax motivation, and it concluded that there was sufficient circumstantial evidence in the record from which the jury could infer that petitioners knew their transactions for Caruana involved illegal drug proceeds. Pet. App. A17-A18. Moreover, the court found that the jury could infer that petitioners, as sophisticated attorneys, understood that Caruana was conducting business in an unorthodox manner in order to conceal his criminal conduct and avoid paying taxes, and that petitioners became willing participants in the tax evasion scheme by performing legal services necessary to hide Caruana's drug-derived income from the government. Pet. App. A18-A19.

ARGUMENT

1. Petitioners contend (Pet. 18-29) that, instead of being charged with a conspiracy to defraud the United States, they should have been charged under the specific offense clause of Section 371 with a conspiracy to engage in money laundering in violation of 18 U.S.C. 1956. They assert that the decision of the court of appeals in this case is in conflict with the decision of the Sixth Circuit in *United States* v. *Minarik*, *supra*.

This Court has rejected the proposition that the "offense" and "defraud" clauses of Section 371 are mutually exclusive, *i.e.*, that a prosecution under the defraud clause is impermissible if the defendants conspired to commit a specific substantive offense. In *Dennis* v. *United States*, 384 U.S. 855, 862-864 (1966), the defendants were convicted of conspiring to defraud the United States by filing false affidavits with the National Labor Relations Board. They argued that the case involved "a conspiracy to commit the substantive offense of filing false statements in violation of 18 U.S.C. § 1001" and that their misconduct "may not properly be laid under the conspiracy-to-defraud clause of [Section] 371." *Id.* at 862-863. This Court held that "[t]he fact that the events [charged] include the filing of false statements does not, in and of itself, make the conspiracy-to-defraud clause of [Section] 371 unavailable to the prosecution." *Id.* at 863-864. See also *Glasser* v. *United States*, 315 U.S. 60, 67 (1942) (where indictment alleging conspiracy to defraud alleges breach of specific statute, that breach is treated as "a way of consummating the conspiracy and * * * like the use of a gun to effect a conspiracy to murder, is purely ancillary to the substantive offense"). Recently, the Court reaffirmed that the defraud clause "reaches any conspiracy for the purpose

of impairing, obstructing or defeating the lawful function of any department of Government." *Tanner* v. *United States*, 483 U.S. 107, 128 (1987) (quotation omitted). Thus, decisions of this Court establish that the conspiracy in this case was properly charged under the defraud clause of Section 371.

We believe that *Minarik* was wrongly decided even on its own facts. The decision finds no support in the language of the statute; it conflicts with *Dennis* and *Tanner*; and its interpretation of the conspiracy statute is unworkable in practice. But even assuming that *Minarik* was correctly decided, it does not conflict with the First Circuit's decision in this case.

First, the Sixth Circuit in *Minarik* recognized that where, as here, a specific statute prohibiting the object of the defendants' conspiracy was not enacted until after the conspiracy began, the conspiracy may be charged under the defraud clause of Section 371. In the Sixth Circuit's words, "the 'defraud' portion of the statute should be viewed 'as an interim measure protecting the [g]overnment until such time as Congress has been able to deal more specifically with a given problem.' " 875 F.2d at 1194, citing Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405, 450 (1959). The money laundering statute was enacted in October 1986 (Pub. L. No. 99-570, Tit. XVIII, § 1352(a), 100 Stat. 3207-18), while the indictment in this case alleged that the conspiracy began in October 1978. Thus, the conspiracy alleged in the indictment could not have been charged as a conspiracy to violate 18 U.S.C. 1956.

Second, *Minarik* itself, as it has been interpreted by the Sixth Circuit in subsequent cases and as it has been understood by other courts, is a narrow decision based on facts unlike the facts of this case. The facts in *Minarik*, which involved the concealment of assets

after a taxpayer had received assessment notices, fell squarely within the prohibition contained in 26 U.S.C. 7206(4) relating to post-assessment concealment. See 875 F.2d at 1187, 1194-1195. Although the government could have brought a charge of conspiracy to violate 26 U.S.C. 7206(4), it instead proceeded under the defraud clause and then changed its theory of the case several times without further specifying the charge. See 875 F.2d at 1187, 1190. Notwithstanding broader dicta in the opinion, the *Minarik* court's actual holding was very narrow: "[W]here the duties of a citizen are as technical and difficult to discern as they are when a taxpayer, before levy, engages in otherwise legitimate activities that may make ultimate collection more difficult, we hold that a Congressional statute closely defining those duties takes a conspiracy to avoid them out of the defraud clause and places it in the offense clause." *Id.* at 1196. The court took pains "to emphasize the limits of our holding." *Id.* at 1195-1196. See also *id.* at 1187 (holding that the offense and defraud clauses of the conspiracy statute were mutually exclusive "as applied to the facts of [that] case").

The narrow scope of *Minarik* is confirmed by subsequent Sixth Circuit decisions. In *United States* v. *Sturman*, 951 F.2d at 1473 n.1, the court noted the support for "limiting *Minarik* to its facts," and in *United States* v. *Mohney*, 949 F.2d at 903, the court agreed that "*Minarik*, * * * by its own language, as well as by implication, created a limited rule to remedy the particular concerns raised by the facts of that case." See also *id.* at 902 (referring to "[t]he *Minarik* court's intention to limit its holding to the particular facts of that case"). The Sixth Circuit has explained that the "chief concern" of *Minarik* "was that the government, by constantly changing the

prosecution theory, never adequately informed the defendant of the charges against him." *Sturman*, 951 F.2d at 1474; see *Mohney*, 949 F.2d at 903; see also *United States* v. *Bilzerian*, 926 F.2d at 1301; *United States* v. *Reynolds*, 919 F.2d at 439. In addition, the Sixth Circuit has ruled that the *Minarik* holding is pertinent only "when the conduct charged constitutes a conspiracy to violate one specific statute." *Mohney*, 949 F.2d at 904; see *Sturman*, 951 F.2d at 1473.

In contrast to *Minarik*, there was no confusion or ambiguity in the charges leveled against petitioner or in the government's conduct of the trial. As the court of appeals recognized, "the government consistently has maintained that defendants sought to deceive the IRS through the money-laundering activities in which they participated." Pet. App. A12. In addition, the object of the conspiracy in this case was not to violate a specific statute by means of a single act, but was instead to engage "in a long-standing and wide-ranging scheme to deceive the IRS regarding the amount and source of Caruana's assets." Pet. App. A13.[2] Accordingly, the facts of this case correspond not to those of *Minarik*, but to those of *Sturman* and *Mohney*, in which the Sixth Circuit upheld convictions for tax conspiracies under Section 371's defraud

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[2] Many of the services petitioners provided to Caruana could not have been charged as money laundering. For example, establishment of the various Panamanian and Bahamian companies used to conceal income from the IRS did not involve "financial transactions" and therefore lacked an essential element of a money laundering violation. See 18 U.S.C. 1956. Similarly, Burnett's use of a secret code and computer to communicate with Caruana while he was a fugitive did not constitute a violation of the money laundering statute but certainly constituted activity designed to hide information from the IRS and thereby impair, impede, obstruct and defeat its lawful functions.

clause. As the Sixth Circuit held in *Sturman*, "[o]nly the defraud clause can adequately cover all the nuances of a conspiracy of the magnitude this case addresses." 951 F.2d at 1473.

2. Petitioners also maintain (Pet. 30-35) that the decision of the court of appeals conflicts with the decision of the Eleventh Circuit in *United States* v. *Pritchett*, 908 F.2d 816 (1990).

In *Pritchett*, the defendants, who had been involved in the concealment of the assets of their brother, a drug dealer, were convicted of conspiring to evade the brother's federal income taxes. 908 F.2d at 818. The Eleventh Circuit reversed the convictions on the ground that the government had failed to establish that the defendants knew that the object of the conspiracy was to enable their brother to avoid paying his taxes. Relying on *Ingram* v. *United States*, 360 U.S. 672 (1959), the court held that the efforts at concealment could reasonably be explained as based on motives other than to evade taxes, and that the government was therefore required to offer independent proof that the defendants had intended to assist the taxpayer in evading taxes. While the government presented evidence that the taxpayer had earned money from drug sales and had failed to file federal income tax returns, the court of appeals found nothing in the evidence indicating that the defendants knew he was not filing returns and did not intend to pay his federal income taxes. 908 F.2d at 820-821.

In contrast to *Pritchett*, there was ample independent evidence in this case from which the jury could have concluded that petitioners intended not merely to conceal assets from the IRS—as in *Pritchett*, see 908 F.2d at 821—but also to hide Caruana's income itself. As the court of appeals explained, Arnold Katz testified that he met with Hurley and informed him

that he was trying to "legitimize" the proceeds of drug dealing, and Hurley explained to Katz how to set up offshore companies "to filter money into them." Pet. App. A20. Although the evidence with respect to Burnett was more circumstantial, the jury could have concluded from the series of transactions in which Burnett produced cash for Caruana that Burnett "was fully aware of, and a full participant in, the underlying fraudulent scheme." Pet. App. A32. Moreover, unlike in *Pritchett*, petitioners were sophisticated lawyers and could well anticipate and understand the effect the services they provided to Caruana would have on the efforts of the IRS to ascertain Caruana's income and collect his taxes. Accordingly, the decision of the First Circuit does not conflict with *Pritchett*, and further review of petitioners' fact-bound claim that the evidence was insufficient to convict them is unwarranted.

3. Petitioners argue (Pet. 35-44) that the "defraud" clause of 18 U.S.C. 371 is so vague that it fails to give them fair warning of the criminal nature of their conduct and thus violates the Due Process Clause of the Fifth Amendment. It has long been settled, however, that the federal conspiracy statute, 18 U.S.C. 371, proscribes conspiracies aimed at impeding and impairing governmental functions through deceit, craft, or trickery. See *Tanner* v. *United States*, 483 U.S. at 128; *Dennis* v. *United States*, 384 U.S. at 860-861; *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924). As the court of appeals held (Pet. App. A15), "[t]he statutory prohibition against defrauding the government adequately put defendants on notice that a scheme designed to frustrate tax collection was prohibited."

While petitioners do not appear to contest the illegality of the stated object of the conspiracy—to

defraud the United States by impeding, impairing, obstructing, and defeating the IRS—they do complain that there was nothing illegal about any of the acts they committed in furtherance of that objective. But this Court has unequivocally held that the means used to accomplish a conspiracy need not be illegal in themselves. See, *e.g.*, *Yates* v. *United States*, 354 U.S. 298, 334 (1957); *Braverman* v. *United States*, 317 U.S. 49, 53 (1942) ("The overt act * * * need not be itself a crime."). Thus, as the court of appeals noted, "lawful activity may furnish the basis for a conviction under § 371." Pet. App. A14.

4. Finally, petitioners contend (Pet. 44-52) that repeated references to "money laundering" in the government's opening statement and closing argument constituted constructive amendment of the indictment, in violation of their rights under the Fifth and Sixth Amendments.

A constructive amendment of an indictment occurs if the indictment's charging terms are altered "by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment." *United States* v. *Hathaway*, 798 F. 2d 902 (6th Cir. 1986); see also *Stirone* v. *United States*, 361 U.S. 212, 218-219 (1960); *United States* v. *Dunn*, 758 F.2d 30 (1st Cir. 1985); *United States* v. *Mollica*, 849 F.2d 723, 729 (2d Cir. 1988); *United States* v. *Von Stoll*, 726 F.2d 584, 586 (9th Cir. 1984); *United States* v. *Davis*, 679 F.2d 845, 851 (11th Cir. 1982), cert. denied, 459 U.S. 1207 (1983); *United States* v. *Somers*, 496 F.2d 723, 744 (3d Cir.), cert. denied, 419 U.S. 832 (1974).

There was no constructive amendment of the indictment in this case. The prosecutor used the

term "money laundering" as a short-hand reference to petitioners' attempt to defraud the United States by concealing assets and evading taxes, not as a reference to any particular offense with which petitioners were charged. The evidence introduced by the government was designed to and did show that petitioners were guilty of the conspiracy offense charged in the indictment. The jury was plainly instructed on the elements of that offense. Petitioners do not allege that those instructions were inadequate in any pertinent respect, nor do they advance any reason to believe that the jury was encouraged to or did disregard them. Accordingly, further review to consider petitioner's claim that the prosecutor should not have used the term "money laundering" in addressing the jury is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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